No. 96-270

In the Supreme Court of the United States

OCTOBER TERM 1995

AMCHEM PRODUCTS, INC. *et al.*,
Petitioners

v.

GEORGE WINDSOR, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS GEORGE WINDSOR, *et al.*

FREDERICK M. BARON
BRENT M. ROSENTHAL
STEVE BAUGHMAN
BARON & BUDD, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, TX 75219
(214) 521-3605

LAURENCE H. TRIBE
Counsel of Record
BRIAN KOUKOUTCHOS
JONATHAN S. MASSEY
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

Counsel for Respondents George Windsor, et al.

September 30, 1996

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

36 pp

PARTIES TO THE PROCEEDING

The parties below are listed in the appendix at 292a. The respondents who were appellants below and who are represented in this Brief in Opposition are George, Constance, Michael and Karen Windsor, Richard R. Preston, Sr., Louis C. Andersen, Albert and Margaret Hertler, Richard E. Blanchard, Jack J. Boston, James Anderson, Harrison O. McLeod, William J. Golt, Sr. and Phyllis Golt, Joe and Lynne Dominguez, Kathryn Toy, and John Paul Smith.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

TABLE OF AUTHORITIES (cont'd)

Constitutional, Statutory, and Rules Provisions

TABLE OF AUTHORITIES (cont'd)

Miscellaneous

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents George Windsor, *et al.*, hereby oppose the petition for writ of certiorari filed by Amchem Products, *et al.*

STATEMENT OF THE CASE

This case involves an unprecedented "settlement class action" seeking to resolve the present and future unaccrued claims of millions of largely unidentifiable individuals who have been exposed to the asbestos products of the twenty companies known as the Center for Claims Resolution (CCR). Most notably, the settlement would extinguish asbestos-related causes of action of individuals who currently suffer no physical injuries but who may, in the future, develop possibly fatal diseases caused by asbestos. The settlement would impose what the Third Circuit deemed a quasi-legislative measure (*see* App. 18a, 58a-59a)[1] to extinguish "futures claims" by "exposure-only" plaintiffs even though those claims have not yet accrued and even though those plaintiffs may not know who they are.

The Court of Appeals properly held that the instant class action could not meet the requirements of Rule 23. The Court of Appeals also expressed "serious doubts as to the existence of the requisite jurisdictional amount, justiciability, adequacy of notice, and personal jurisdiction over absent class members." App. 19a. The Third Circuit explained that it was compelled to reject the settling parties' radical proposal:

> [I]n doing so, we avoid a serious rend in the garment of the federal judiciary that would result from the Court, even with the noblest motives, exercising power that it

---

[1] Citations to the Appendix to the Petition for Certiorari are styled "App. __." Citations to the Petition for Certiorari are styled "Pet. __." Citations to the Joint Appendix in the Court of Appeals are styled "J.A. __."

> lacks. We thus leave legislative solutions to legislative channels.

App. 20a. The Court of Appeals was plainly correct, and its judgment should not be disturbed.

1. Background Facts and Procedural History. This unprecedented proceeding began in an extraordinary fashion. After judicially sponsored attempts to negotiate settlements of *pending* asbestos cases had stalled (Pet. 4), petitioners "approached" class counsel (not the other way around) in an effort to resolve *future* asbestos claims *before they accrued*. J.A. 1237. Petitioners later testified that they "decided to target" Gene Locks and Ron Motley, the plaintiffs' attorneys who eventually became class counsel in this case. J.A. 1191. As CCR's chief executive officer put it, "We picked them." *Id.* Prior to suit, petitioners agreed to pay class counsel's fees as part of the stipulation of settlement (J.A. 421) — in effect agreeing to pay the fees of a supposed opponent for instituting a class action against them.

While putative class counsel were negotiating on behalf of the as-yet-unformed class of future claimants, they simultaneously represented about 14,000 plaintiffs who had already filed lawsuits against petitioners. Before the class negotiation concluded, class counsel settled those "present" cases with petitioners for a total of $215 million in cash, including attorneys fees of approximately $70 million. J.A. 1399. Also prior to suit, class counsel entered into fallback side agreements, enforceable if the class action settlement fell through, that would contractually prevent class counsel from filing "exposure-only" or other claims against petitioners that did not meet the stringent medical criteria ultimately included in the class action settlement. J.A. 1197-98, 1394-98.

On Jan. 15, 1993, petitioners and counsel for the putative class simultaneously filed a class action complaint, an answer by the defendants, a joint motion by the parties to certify the case as a class action "for settlement purposes only," and the

proposed settlement that petitioners had previously negotiated with their own hand-picked attorneys for the plaintiff class. There were no motions, no discovery requests, and no preliminary litigation of any kind. In a very real sense, this case was settled before it was filed.

The class that the plaintiffs purport to represent, described by the Third Circuit as "humongous" (App. 42a), includes all persons (and present and future family members) who were occupationally exposed to petitioners' asbestos products but who (whether injured or not) had not filed suit as of Jan. 15, 1993. The selection of that date as an artificial boundary allowed class counsel to gerrymander the class to exclude their then-existing inventories of asbestos plaintiffs, whose cases were settled outside the class action on dramatically different terms. *See* Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1051-64 (1995); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1393-95 (1995). The class comprises both individuals who currently have asbestos-related illnesses (and survivors of persons who have already died of asbestos-related diseases), and other individuals (probably numbering in the millions)[2] who were occupationally exposed to asbestos but who have not yet developed, and may never develop, any physical injuries related to the exposure.

Five of the nine named plaintiffs alleged that they had sustained physical injuries as a result of petitioners' asbestos products. Four of the named plaintiffs, however, expressly alleged that, although they had been exposed to petitioners' asbestos-containing products, they had not yet sustained an asbestos-related "condition." J.A. 270-77. These exposure-

---

[2] *See Jackson v. Johns Manville Sales Corp.*, 750 F.2d 1314, 1323 (5th Cir. 1985) (en banc) (estimated 21 million Americans have been exposed to asbestos).

only representative plaintiffs conceded in discovery and in sworn testimony at the fairness hearing that "absent the settlement, they did not intend to pursue the claims in the class complaint. They claimed *no damages* and *no present injury*." App. 66a (Wellford, J., concurring)(emphasis added).

The settlement would resolve all claims for asbestos-related physical injuries that have occurred or may occur in the future by channelling the claims to an administrative claims process to be established and operated by petitioners. The administrative process requires that claimants satisfy strict medical criteria (more stringent than otherwise applicable state law) in order to qualify for payment of compensation. Petitioners will then offer compensation to qualifying claimants in amounts within a predetermined range, but the settlement caps both the number of claims that can be paid in any given year and the amount that can be paid to individual claimants.

The Court of Appeals catalogued the salient features of the settlement. Payment under the settlement is not adjusted for inflation. App. 25a, 50a. The settlement theoretically allows claimants dissatisfied with the compensation offered by petitioners to "exit" to the tort system, but drastically limits the number who can do so to "a few persons per year." App. 49a. Further, although the plaintiffs are bound to the settlement in perpetuity, the defendants are not: each defendant is free to withdraw from the settlement after ten years. *Id.* at 25a-26a.

Moreover, the claims asserted by the exposure-only plaintiffs — claims for increased risk of cancer, fear of future asbestos-related injury, and medical monitoring — receive no payment under the stipulation of settlement. App. 49a. In addition, "pleural" claims, which involve asbestos-related plaques on the lungs, "receive no cash compensation, even though such claims regularly receive substantial monetary payments in the tort system." App. 26a.

Unrebutted evidence indicates that approximately half the claims that are filed in state and federal court, and paid by

petitioners, would not qualify for payment under the exposure and medical criteria contained in the settlement. J.A. 1363, 1379. In addition, the stipulation of settlement is much stingier than the "inventory settlements" paid by petitioners to plaintiff class counsel in the $215 million side agreement just prior to the commencement of the instant action. App. 24a, 30a-31a, 48-49a. Individual clients in the inventory settlements received a 54% premium over the maximum average payment under the class action.[3] And the terms of the inventory settlement provided for cash payments to many present clients who would not have qualified for any compensation under the terms of the class settlement. J.A. 1248-49, 1300-01.

2. The District Court's Decision. Two weeks after suit was filed, the district court conditionally certified the proposed class without any notice to putative class members, without a hearing, and without the receipt of evidence. J.A. 452.

Respondents and other absent class members challenged the class action and settlement under Fed.R.Civ.P. 23, the "case or controversy" requirement of Article III, standing, due process, 28 U.S.C. § 1332 (relating to amount-in-controversy subject-matter jurisdiction), and on other grounds. Joined by labor unions, asbestos victims' groups, and the States of Texas and Alabama, respondents also vigorously challenged the fairness of the proposed settlement. Thirty-seven law professors who teach or write in the area of professional responsibility submitted an amicus brief contending that insuperable conflicts of interest existed within the plaintiff class and between class counsel and their supposed clients.[4]

---

[3] *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1397 (1995).

[4] Dist. Ct. Dkt. No. 991 (Apr. 4, 1994). The district court refused to permit the brief to be filed. Dkt. No. 1010 (Apr. 11, 1994). For further criticisms of the settlement's fairness, see Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV.

For their part, petitioners conceded on the record that "this case cannot meet the various requirements of Rules 23(a) and 23(b) when viewed as a litigation class." J.A. 456-57. Petitioners acknowledged that the case had not been "brought for the purpose of litigation" nor had it been "actually litigated for some period of time," but was instead "brought for purposes of settlement only." Fourth Supp. App. in Ct. App. 23-24. Indeed, petitioners averred that "asbestos claims cannot be fairly handled in mass proceedings" because "each claim is different with respect to most elements of each plaintiff's cause of action." Second Supp. App. in Ct. App. 45. Petitioners also admitted that the "claim" asserted in the class action was "not a 'claim' of the usual kind," and the settlement "did not resolve any previously asserted claim ... [but] was in substance an agreement structuring the future resolution of as yet unasserted claims." *Id.* at 18.

The district court denied all objections to jurisdiction and certification, ruled that the settlement was fair to the class, and tentatively approved the settlement. The court did not enter a final, appealable judgment, in part because of the pendency of a third-party action by petitioners against their insurers seeking a declaration that their settlement did not violate any provision of their insurance policies. App. 24a n.4, 276a. The district court did, however, enter a preliminary injunction prohibiting class members from filing asbestos-related damages suits against petitioners in the state or federal courts, effectively requiring class members to pursue any asbestos-related claims against petitioners under the terms of the settlement.

3. The Court of Appeals' Decision. On appeal, respondents and other objecting class members could challenge only the preliminary injunction; attacks on the district court's non-final determination under Rule 23(e) that the settlement

---

1045 (1995); Roger Parloff, *The Tort That Ate the Constitution*, AMERICAN LAWYER, July/August 1994, at 75.

was fair were reserved for any appeal from a final judgment. Hence, petitioners' attempt to attach significance to the fact that the district court's fairness decision "was not challenged" in the appeal from the injunction (Pet. 5, 8) is a canard.

The Third Circuit vacated the injunction and remanded the case to the district court with instructions to decertify the class. It expressed "serious doubts as to the existence of the requisite jurisdictional amount, justiciability, adequacy of notice, and personal jurisdiction," but elected to pass over these issues because it deemed the class certification question dispositive. App. 19a. The Third Circuit held that the class could not meet the Rule 23(a) requirements of typicality and adequacy of representation, or the Rule 23(b)(3) requirements of predominance and superiority. The court explained that "the class members' claims vary widely in character." App. 41a. Class members were exposed to "different asbestos-containing products, for different amounts of time, in different ways, and over different periods." *Id.* The court concluded that:

> These factual differences translate into significant legal differences. Differences in amount of exposure and injury lead to disparate applications of legal rules, including matters of causation, comparative fault, and the types of damages available to each plaintiff.

Id. The court also noted that the application of at least 50 different sets of state laws in this nationwide diversity class action would "exponentially" compound the problem. *Id.* at 41a-42a.

With respect to adequacy of representation, the Court of Appeals held that "serious intra-class conflicts preclude this class from meeting the adequacy of representation requirement" of Rule 23(a)(4). App. 49a. The court explained that "the settlement makes numerous decisions on which the interests of different types of class members are at odds." *Id.* For example, "under the settlement many kinds of claimants (*e.g.*,

those with asymptomatic pleural thickening) get no monetary award at all." *Id.*

> The settlement makes no provision for medical monitoring or for payment for loss of consortium. The back-end opt out is limited to a few persons per year. The settlement relegates those who are unlucky enough to contract mesothelioma in ten or fifteen years to a modest recovery, whereas the average recovery of mesothelioma plaintiffs in the tort system runs into the millions of dollars.

Id. Moreover, the settlement exacerbates conflicts between "exposure-only" plaintiffs whose claims will arise in the future, and currently injured victims:

> [T]hose who are not yet injured would want reduced current payouts (through caps on compensation awards and limits on the number of claims that can be paid each year). The futures plaintiffs should also be interested in protection against inflation, in not having preset limits on how many cases can be handled, and in limiting the ability of defendant companies to exit the settlement. Moreover, in terms of the structure of the alternative dispute resolution mechanism established by the settlement, they should desire causation provisions that can keep pace with changing science and medicine, rather than freezing in place the science of 1993. Finally, because of the difficulty in forecasting what their futures hold, they would probably desire a delayed opt out....

Id. at 50a. On each of these points, the interests of "exposure-only" plaintiff class members were diametrically opposed to those of currently injured class members.

Further, the Court of Appeals found that Rule 23(b)(3)'s requirement that the class action be "superior to other available methods for the fair and efficient adjudication of the controversy" was not satisfied in part because the settlement's denial of delayed opt-out rights to currently uninjured class members raised "serious fairness concerns." App. 57a. In making this determination, the court explicitly cited the relevant provisions of the settlement denying class members opt-out rights if and when they developed an asbestos-related injury. *Id.* at 56a n.16.[5]

In a concurring opinion, Judge Wellford "fully subscribe[d]" to the panel's decision "that the plaintiffs in this case have not met the requirements of Rule 23," App. 60a, but wrote separately to express the view that the exposure-only plaintiffs, who "claimed no damages and no present injury ... had no standing to pursue this class action suit" and hence could not be bound by the result. *Id.* at 66a.

---

[5] Petitioners assert that "all class members were afforded a reasonable opportunity to opt out of the class." Pet. 6. But the Third Circuit expressed "serious doubts" as to the adequacy of notice in this case (App. 19a, 33a) and opined that the "[p]roblems in adequately notifying and informing exposure-only plaintiffs of what is at stake in this class action may be insurmountable." *Id.* at 55a. Specifically, the court pointed out that because asbestos-related illnesses like mesothelioma may be caused by slight and incidental exposure to asbestos, many currently uninjured class members may not know that they have been exposed to asbestos within the terms of the class definition. *Id.* Even if they know of their exposure, the court added, such as yet uninjured class members "may pay little attention to class action announcements" and are "unlikely to be on notice that they can give up causes of action that have not yet accrued." *Id.* And even if those currently uninjured class members find out about the class action and realize that they fall within the class definition, the court noted, "they may lack adequate information to properly evaluate whether to opt out of the settlement." *Id.* at 56a. The court declined to rule on the "powerful three-pronged argument" that the notice provided by the settling parties in this case "did not meet the requirements of Rule 23 or the Constitution," *id.* at 31a, because it found the class certification issues dispositive. *Id.* at 33a-34a.

REASONS FOR DENYING THE WRIT

Petitioners rely heavily on misdirection. They allege that the Third Circuit ignored the existence of the settlement in deciding whether the requirements of Rule 23 were satisfied, when precisely the opposite is true. Once petitioners' smokescreen is cleared away, it is plain that the Third Circuit's judgment is correct and should not be disturbed.

I. PETITIONERS DO NOT CHALLENGE THE COURT OF APPEALS' JUDGMENT, BUT SEEK ONLY TO REVISE THE COURT OF APPEALS' OPINION.

As petitioners would have it, the Question Presented is whether a district court considering a settlement-only class action "must ... ignore the existence of the settlement in determining whether class certification is appropriate." Pet. at i. But far from ignoring the settlement, the Court of Appeals expressly considered it in applying several of Rule 23's requirements. The court carefully examined the settlement's terms in the course of holding that the class failed the Rule 23(a)(4) requirement of adequacy of representation, and the Rule 23(b)(3) requirement that the class action be "superior" to other available methods for the "fair" adjudication of the controversy.

Those holdings constitute independent grounds for the judgment below that the Question Presented simply does not encompass. However this Court might resolve that question, the answer would not alter the judgment below. Petitioners' request for an advisory opinion regarding the Third Circuit's analysis of *other* requirements of Rule 23, which arguably did not consider the settlement, is therefore foreclosed by the principle that this Court's "power is to correct wrong judgments, not to revise opinions." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945); *see also Texas v. Hopwood*, 116 S.Ct. 2581,

2581 (1996) (Ginsburg, J., joined by Souter, J., respecting the denial of certiorari).

Petitioners contend that:

> [T]he Third Circuit's insistence on applying all of the Rule 23 factors "without taking into account the settlement" (App. 48a-51a) equally infected its conclusion that class members hypothetically had different interests in pursuing their claims, thereby rendering class counsel inadequate.

Pet. 29. This quotation that petitioners purport to extract from the opinion below is, to be blunt, a rank fabrication. That language about not "taking into account the settlement" simply does not appear on the pages cited, nor anywhere else in the Third Circuit's discussion of adequacy of representation.[6] In truth, the very centerpiece of the Third Circuit's analysis under Rule 23(a)(4) is a searching examination of the settlement's terms that reveals insuperable structural conflicts of interest within the class. The Court of Appeals' opinion describes the

---

[6] Petitioners may be quoting (but misciting) App. 39a. Petitioners also perpetrate other misrepresentations of the record and opinions below. At page 29 of their petition they invoke supposedly "unchallenged factual findings" by the district court that "there is no antagonism of interest" among class members. But what petitioners cite (App. 230a) was not an "unchallenged" finding of fact at all, but a *conclusion of law* about adequacy of representation that was simply *reversed* by the unanimous Third Circuit holding that the class was rife with structural conflicts. The Court of Appeals did not question the district court's findings on the qualifications of class counsel (App. 49a); but those findings were irrelevant to the *structural* conflicts of interest within the class that the Third Circuit deemed fatal. *See* App. 49a-52a. The other district court findings cited by petitioners (Pet. 29) pertain *not* to adequacy of representation, but to the supposed substantive fairness of the settlement itself. *See* App. 115a-176a, 234a-248a. Petitioners apparently believe that they can bootstrap a determination of fairness under Rule 23(e) into a determination of adequate representation under Rule 23(a)(4). They are wrong. Rule 23's requirements are cumulative and independent, not alternative. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-77 (1974).

multiple ways in which the interests of various segments of the class in this case conflict with respect to the settlement's allocation of recovery — in particular, the ways that the interests of future claimants are adverse to those of presently injured class members. App. 49a-51a. The failure of the proposed class to meet the representation requirement is an independent basis for the judgment below that is beyond the scope of the Question Presented.

The Third Circuit also concluded, again as an independent ground for its judgment, that this case does not satisfy the "superiority" requirement of Rule 23(b)(3), which involves tests of both efficiency (the manageability of the class action) and fairness to the absent class members. App. 54a. The court expressly considered the fairness component of Rule 23(b)(3) in light of the settlement. App. 54a-57a. The Court of Appeals held that the superiority requirement could not be met because of the patent unfairness of the settlement's release of future claims: "some plaintiffs would be bound despite a complete lack of knowledge of the existence or terms of the class action." App. at 57a.

In sum, far from ignoring the settlement, the court discussed its terms in detail, and those terms provided the basis for its holdings that the class failed both the Rule 23(a)(4) adequacy-of-representation test and the Rule 23(b)(3) superiority test. Because the petitioners' Question Presented asks only whether the court could permissibly ignore the settlement in considering the class certification criteria, no answer to their question could alter the Third Circuit's *judgment*, even if it might offer this Court an opportunity to revise *part* of the Third Circuit's *opinion*. The petition should therefore be denied.[7]

---

[7] Ironically, petitioners contend that one of the reasons for this Court's denial of certiorari in *In re General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995) (*GM Trucks*), was that the Third Circuit had included an "alternative and independent ground" for its decision — its conclusion that the settlement was unfair. Pet. at 16 n.12. However, in *GM Trucks*, unlike this case, the petitioners sought review by this Court of *both* of the Third Circuit's holdings. *See* Cert. Petition in No. 94-2137 at i. Thus, while in *GM Trucks* this Court might have altered the lower court's judgment by granting certiorari on both of the questions presented by the petitioners, a grant in this case *cannot* affect the Third Circuit's judgment because the petition does not encompass all of that court's independent rationales for vacating class certification.

II. REVIEW SHOULD BE DENIED REGARDLESS OF HOW THIS COURT MIGHT DECIDE THE QUESTION PRESENTED, BECAUSE THE PLAINTIFF CLASS HAS ABANDONED THIS CLASS ACTION.

This class action no longer involves a plaintiff class. No class representatives have sought certiorari. No plaintiffs' class counsel has joined the asbestos defendants' petition, nor has any separate petition on behalf of the plaintiff class been served on respondents. Thus, the named plaintiffs have acquiesced in the judgment of the Third Circuit. Only the defendant asbestos manufacturers seek certiorari in an attempt to defend class certification, yet with respect to that issue the defendants have no legal duties to the class whose interests are at stake. Consequently, the defendants' plea for judicial intervention to save a settlement that they are promoting as a panacea for docket congestion is entirely divorced from any actual class action. The defendants are flying solo.

As objectors in the courts below, the respondents challenged, *inter alia*, the typicality of the class representatives' claims and the adequacy of their representation of the class's interests. The Court of Appeals validated these challenges and decertified the class. These prerequisites for class certification under Rule 23 are of course designed to protect the absent members of the plaintiff class, rather than the defendants. These requirements are therefore the responsibility not of the

defendants who appear as petitioners here, but of the plaintiff class representatives and their class counsel, *who do not appear here in any capacity*.

It is unclear whether the defendants are purporting to represent the absent class, or whether the defendants are simply asking this Court to reinstate the class action for defendants' sake, without regard to whether it serves the interests of the plaintiff class and without regard to whether that class is adequately (or indeed *at all*) represented here. Now that the class counsel and the class representatives have abandoned the responsibility of acting as guardians of the plaintiff class — in the wake of the Third Circuit's ruling that they were incapable of adequately performing that role — the fox seems eager to take over the job of guarding the henhouse. This the petitioning asbestos company defendants surely may not do.

Even if the petitioners were to prevail before this Court on the narrow Rule 23 question they have presented, their victory celebration would be the sound of one hand clapping, because the class representatives and their class counsel appear to have flown the coop. If this orchestrated class action was ever adversarial — which the court below doubted, *see* App. 19a, 30a-31a — it certainly isn't anymore. It takes two to tango, and the defendant petitioners cannot sue themselves. *See Keene Corp. v. Fiorelli*, 14 F.3d 726 (2d Cir. 1993). Nor can they assume the role of policing and auditing their own operation of the settlement's administrative claims process, a task that the settlement expressly accorded not to them but to the now absent class counsel. App. 200a. Simply put, the defendants cannot foist their longed-for class action and their cherished settlement proposal on a plaintiff class that has abandoned the case.[8]

---

[8] Respondents have been informed by one of the former class counsel that class counsel no longer support the settlement. Whatever class counsel's motivation for refusing to join the defendants' petition, and whatever the class representatives' own reasons for deciding not to seek review, the fact remains that this is now a "class action" without a "class."

The issues lurking in this case, while not squarely presented for review here, are far too important to be considered by this Court in a vacuum. Yet the absence of the erstwhile plaintiff class representatives and their class counsel has created just such a void and has rendered this case wholly unsuitable for addressing the supposed uncertainty in the law of class actions that petitioners believe the decision below has fostered. The Court should await a better, less contingent, less hypothetical and less bizarre case in which to address Rule 23 in the settlement class context.

III. REVIEW IS UNWARRANTED BECAUSE THE COURT OF APPEALS' JUDGMENT IS PLAINLY CORRECT.

Review is inappropriate for the further reason that the Court of Appeals' judgment is demonstrably correct. The Third Circuit properly held that the putative class could not meet the predominance requirement of Rule 23(b)(3), the adequacy of representation requirement of Rule 23(a)(4), the typicality requirement of Rule 23(a)(3), or the superiority requirement of Rule 23(b)(3).

1. The Third Circuit's application of the adequacy of representation and superiority requirements is not in serious dispute. Petitioners' only argument is that the Third Circuit should have considered the settlement in applying those requirements. But the Court of Appeals did precisely that.

Nor did the Court of Appeals err with respect to the typicality and predominance requirements. There is only one version of Fed.R.Civ.P. 23. As the Court of Appeals observed, "'[t]here is no language in the rule that can be read to authorize separate, liberalized criteria for settlement classes.'" App. 38a. That omission explains the current effort

by some members of the Judicial Conference's Advisory Committee on Civil Rules to create new, relaxed criteria for settlement classes. App. 58a.

The plain language of the typicality and predominance requirements in the current Rule 23 — which petitioners carefully avoid quoting[9] — strongly supports the Third Circuit's view. The typicality standard of Rule 23(a)(3) requires a court to examine "the claims or defenses of the representative parties" and "the claims or defenses of the class." This language obviously refers to *legal claims* and defenses that class members could assert in court against an opposing litigant — not to abstract or generalized *interests* that class members might have in a settlement. Similarly, the predominance requirement refers to "questions of law or fact common to the members of the class." As the Court of Appeals noted (App. 43a-44a), this language has always been interpreted — beginning with the Advisory Committee Notes to the 1966 amendment of Rule 23(b)(3) — as pertaining to legal or factual questions arising from an in-court, Article III controversy, not to questions of bargaining strategy arising from a negotiated settlement. Focusing on actual, triable legal claims is hardly "artificial" or "hypothetical," as petitioners insist (Pet. 18, 21, 27) — unless, of course, the claims themselves are "artificial," as they were here.

Petitioners' reliance on *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982) (*see* Pet. 22), is misplaced, because that decision supports the judgment below. The very passage they cite explains that the commonality and typicality requirements of Rule 23 serve to determine *both* whether the class procedure will promote judicial economy *and* whether

---

[9] Instead of addressing the language of the predominance and typicality requirements, petitioners discuss only the text of the superiority standard of Rule 23(b)(3) (Pet. 22). But the Third Circuit expressly considered the terms of the settlement in applying the superiority requirement. *See* Part I, *supra*.

"the named plaintiff's *claim* and the class *claims* are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." 457 U.S. at 157 n.13 (emphasis added). As a result, "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's *cause of action*." *Id.* at 160 (emphasis added) (internal quotations omitted). This Court's unanimous decision in *Falcon* thus confirms that these class certification criteria require a district court to analyze the *claims* alleged in the class complaint, rather than simply the terms of the settlement, to assess the propriety of certification.

2. Petitioners prefer to ignore Rule 23's focus on triable legal claims. They instead make a naked plea for a novel "rule of pragmatism" (Pet. 25), arguing that "the certification inquiry must be directed to the *actual* status of the proceeding." Pet. 22. But that is just our point: no certification under Rule 23 is possible when the "actual status" of a proceeding reveals that it could never qualify for litigation. The contrary view would effectively enable *any* class action, no matter how non-adversarial and unsuited for litigation, to be submitted via settlement to a federal court for an adjudicated resolution. As the Third Circuit has previously warned, such a rule would convert a federal court into a "mediation forum." *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 799 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995) (*GM Trucks*).

Thus, it is highly revealing that petitioners unabashedly refer to the "hypothetical litigation" in this case "that assuredly *never* will occur." Pet. 22 (emphasis in original). They seem to forget that the federal judicial power is confined to the adjudication of *triable* cases and controversies. *See, e.g., Muskrat v. United States*, 219 U.S. 346, 353-63 (1911); *Gordon v. United States*, 117 U.S. 697, 699-706 (1865); *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.† (1792).

3. Petitioners also contend that:

> [T]he court of appeals' underlying concern — the danger that class counsel will feel pressure to enter into inequitable settlements — is addressed in a settlement class action by the searching review of the fairness of settlements that courts routinely undertake pursuant to Rule 23(e).

Pet. 27. But neither the structure of Rule 23 nor the constitutional guarantees of due process permit this cart-before-the-horse approach to class certification.

Under the structure of Rule 23, the provisions of subdivisions (a) and (b) are independent requirements that must be satisfied, quite apart from the additional barrier created by Rule 23(e), which requires court approval of any settlement. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974). "[T]he inquiry into the settlement's fairness cannot conceptually replace the inquiry into the propriety of class certification." *GM Trucks*, 55 F.3d at 795. Class members are entitled to *all* of the safeguards provided by Rule 23 and due process, and courts may not pick and choose which of those protections to apply in a particular case. To state that class members are united in interest in maximizing overall recovery begs the question whether the named plaintiffs are constitutionally adequate representatives of the absentees' claims. A myopic focus on the settlement terms ignores the possibility of collusion or intra-class conflicts that should preclude class certification, as the Third Circuit found here.

Indeed, to relax Rule 23's standards in settlement class actions would erode the safeguards of the rule precisely when they are needed most. In the settlement class context, there is an increased danger of collusion or undue pressure. As Chief Judge Posner has explained:

> The danger of a premature, even a collusive, settlement is increased when as in this case the status of the action as a class action is not determined until a settlement has been negotiated, with all the momentum that a settlement agreement generates.

Mars Steel Corp. v. Continental Illinois National Bank, 834 F.2d 677, 680 (7th Cir. 1987). If a case never triable in class form could nonetheless be settled in class form, then any defendant facing mass tort liabilities could hand-pick purported plaintiffs' counsel for settlement "negotiations," as occurred in this case.[10] A reverse auction would ensue, in which defendants could "sell" the lucrative right to be plaintiff class counsel to the lowest bidding attorney:

> [B]ecause the court does not appoint a class counsel until the case is certified, attorneys jockeying for position might attempt to cut a deal with the defendants by underselling the plaintiffs' claims relative to other attorneys.

GM Trucks, 55 F.3d at 788. Such escapades would shred the protection afforded absent class members by Rule 23 and make a mockery of the judicial process.

4. Petitioners forecast heavy federal docket congestion from asbestos cases if settlement class actions are required to comply with Rule 23 — and, we might add, with Article III. But such exigencies cannot excuse violating fundamental principles of federal litigation. In the end, petitioners' appeals to "pragmatism" (App. 25a) and "practicalit[y]" (27a) are nothing more than a prayer for the Article III judiciary to rush in where Congress has feared to tread. This Court has heard — and rejected — this siren song before: "The plea is for a resulting power to deal with a crisis or an emergency according

---

[10] *See* J.A. 1191, 1237. *See also* Koniak, 80 CORNELL L. REV. at 1053 ("CCR approached Messrs. Locks, Motley, and Rice, who agreed to serve as class counsel in such an action").

to the necessities of the case, the unarticulated assumption being that necessity knows no law." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring). Yet even supposed "necessity" must bow to the law when the Constitution's structural limitations on governmental power are at stake, because "the Framers ranked other values higher than efficiency." *INS v. Chadha*, 462 U.S. 919, 959 (1983).

Moreover, whether there is a "crisis" in asbestos litigation is the subject of intense debate among judges, academics, and legislators. *See, e.g.*, Coffee, 95 COLUM. L. REV. at 1364; John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 996, 1010-12 (1995).[11] Even the authorities cited by petitioners maintain that asbestos cases are increasingly "mature" torts, and that, because the initial period of litigation has already established the parameters of liability and fixed the likely recovery values, the claims will increasingly be resolved through consensual settlements on a case-by-case basis. Roger Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 78-79. In fact, petitioners informed the district court that they already settle

[11] Indeed, these very same petitioners (in their collective voice as the Center for Claims Resolution) severely criticized what they saw as the alarmism of the Ad Hoc Committee's 1991 report (a report petitioners now purport to embrace). Petitioners argued: (1) that "claims for significant [asbestos] impairment" are in fact "on the decline, due to lowered workplace exposure levels in the past few decades;" (2) that any surges in federal asbestos filings are largely attributable to the publicity surrounding "radical consolidation or class action techniques" promoted by particular federal judges, which attract lower value claims that might otherwise never be filed; and (3) that proposals for mass class actions or consolidations could not be achieved under current law, would exceed the courts' legitimate authority, and would violate the separation of powers. *A Critical Analysis of the Report of the Ad Hoc Committee on Asbestos Litigation* (Center for Claims Resolution, May 7, 1991) in Second Supplemental Appendix in the Court of Appeals at 39, 41, 45-48.

99.8% of the asbestos claims filed against them,[12] and this figure does not even include the mass inventory settlements that petitioners have been able to negotiate, such as the thousands of pending claims that the petitioners settled in one stroke with the former class counsel on the eve of the filing of this class action.[13] The named plaintiffs in this case apparently do not believe that the settlement set aside by the Third Circuit is urgently needed, for they did not bother to file their own petition for certiorari or even to join the petition filed by the defendants.[14]

More fundamentally, petitioners' hyperbolic claims simply do not withstand scrutiny. Petitioners insist that, "[u]nder the Third Circuit's rule, mass tort cases ... cannot be settled, but must go on through years of grinding litigation," Pet. 2, and that the defendant would therefore "face a certified litigation class if the settlement ultimately falls apart or is disapproved.... No rational defendant would agree to settle in these circumstances." *Id.* at 19.

[12] Fourth Supplemental Appendix in the Court of Appeals at 33.

[13] The only conceivable barrier to petitioners' achieving many additional (and equally efficient) inventory settlements with other plaintiffs would be the possibility that the $215 million inventory settlement with the former class counsel in this case was not a *bona fide* settlement, but instead a bribe to induce class counsel to bring this "settlement class action" against the petitioners. Petitioners have of course denied any such possibility, although the Third Circuit raised grave doubts about the matter. App. 30a-31a.

[14] Another major asbestos defendant, Owens-Illinois, urged the Third Circuit to reject petitioners' dire warnings about docket collapse if this settlement class action were decertified. Owens-Illinois explained that the MDL process has already been extremely successful in resolving tens of thousands of asbestos claims by regular means (65% of all pending federal cases have been resolved as active matters as to all parties), and that experiments such as this "future claims" class action are entirely unnecessary. *See* Brief *Amicus Curiae* of Owens-Illinois in Opposition to Petition for Rehearing In Banc at 2-3.

But the Court of Appeals' decision belies petitioners' dire prediction. The Third Circuit expressly approved settlement class actions "whereby the court postpones formal class certification until the parties have successfully concluded a settlement." App. 37a n.9. The Court of Appeals added that, in such circumstances, "the court allows the defendant to challenge class certification in the event that the settlement falls apart." *Id.* In addition, the Third Circuit expressly contemplated "[a] series of statewide or more narrowly defined adjudications, either through consolidation under Rule 42(a) or as class actions under Rule 23" as viable means to resolve asbestos cases fairly and efficiently. App. 57a. Hence, the Third Circuit's decision does *not* confine the courts to "case-by-case adjudication of asbestos claims." Pet. 19.

Even if petitioners' predictions of congestion were correct, petitioners would nonetheless be seeking relief from the wrong branch of government. As the Court of Appeals recognized, although the "desirability of innovation in the management of mass tort litigation does not escape the collective experience of the panel, ... reform must come from the policy-makers, not the courts." App. 58a.

IV. ONLY ONE CIRCUIT COURT HAS EVER RELIED EXCLUSIVELY ON THE EXISTENCE OF A CLASS SETTLEMENT TO SATISFY RULE 23's REQUIREMENTS.

Petitioners grossly overstate the extent of the circuit court conflict regarding proper application of Rule 23 to "settlement classes." The Third Circuit's refusal to ignore the requirements of Rule 23 merely because the parties have reached a proposed settlement is consistent with every circuit court decision, with the possible exception of the Fifth Circuit's recent opinion in *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996), petition for rehearing pending (5th Cir). Thus, it is not the decision below that has "throw[n] the law governing class action

settlements into complete confusion." Pet. 2. To the extent any confusion exists, the Fifth Circuit has created it by being the first court of appeals to hold that the due process protections provided by Rule 23(a) may be ignored when the case has settled. *See In re Asbestos Litigation*, 90 F.3d at 996 ("Our sister circuits have rejected all other actions that came even close to attempting what Fibreboard has done here.") (Smith, J., dissenting).

Other than *In re Asbestos Litigation*, none of the circuit decisions cited by petitioners (which are the same decisions they unsuccessfully pressed below) supports their position regarding the propriety of certification in this case. And even *Asbestos Litigation* provides only weak support. The Fifth Circuit stated that, if it had confronted the facts of this case, it

> would likely agree with the Third Circuit that a class action requesting individual damages for members of a global class of asbestos claimants would not satisfy the typicality requirements due to the huge number of individuals and their varying medical expenses, smoking histories, and family situations.

In re Asbestos Litigation, 90 F.3d at 976 n.8.[15]

Petitioners rely first on *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989), a mass tort class action involving the claims of 300,000 plaintiffs against the insurer of a bankrupt medical device manufacturer, in which class certification was sought under the non-opt-out provisions of Rule 23(b)(1)(A) — not Rule 23(b)(3), the Rule applicable here. *Robins* did *not* hold that the Rule 23 criteria apply differently to a settlement class. To the contrary, the Fourth Circuit opined that:

---

[15] In *Asbestos Litigation* itself, the Fifth Circuit considered the certifiability of a settlement class under Rule 23(b)(1)(B), the so-called limited fund class action provision, rather than Rule 23(b)(3), the provision at issue here.

> [A class action] must satisfy all *four* steps of the prerequisites mandated by subsection (a) of the Rule.... Assuming qualifications under (a) have been met, the next step demands that the action fit within at least one of the three categories of actions identified in subsection (b) of the Rule.

880 F.2d at 727-28 (emphasis in original). Although *Robins* stated in dictum at the very end of its discussion that "settlement should be a factor" in class certification, *id.* at 740, it did so only in the context of noting the permissibility of settlement class actions under Rule 23, *id.* at 738, a point with which the Third Circuit agreed. *See* App. 36a-37a & n.9.

The Ninth Circuit's decision in *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615 (9th Cir. 1982), is likewise inapposite. There, the attack on the settlement in no way implicated the question whether the criteria for certifying settlement classes are less stringent than for litigation classes. Indeed, before the parties had ever reached a settlement, the district court had *already* certified the class for litigation purposes, both under Rule 23(b)(2) and Rule 23(b)(3), and class members were given the opportunity to opt out at that time. The objector did not opt out and then complained that a subsequent settlement did not give him *another* chance to do so. The Ninth Circuit simply held that neither Rule 23 nor due process required that class members "be given a second chance to opt out." *Officers for Justice*, 688 F.2d at 635.

Similarly, *In re Dennis Greenman Securities Litig.*, 829 F.2d 1539 (11th Cir. 1987), involved a class action that had been certified by the district court prior to the commencement of settlement negotiations. 829 F.2d at 1543. Moreover, in direct contrast to the position of the petitioners, in *Greenman* the Eleventh Circuit held that, even after a settlement has been proposed, "[t]he prerequisites of Rule 23(a) must be satisfied,"

along with "one of the subsections to Rule 23(b)...." *Id.* at 1544 & n.5.[16]

Neither *Malchman v. Davis*, 761 F.2d 893 (2d Cir. 1985), nor *Weinberger v. Kendrick*, 698 F.2d 61, 72 (2d Cir. 1982), conflicts with the Third Circuit's decision below. In both cases, the Second Circuit assessed the adequacy of representation by reference to the settlement — as did the Third Circuit in the case at bar. Moreover, neither *Malchman* nor *Weinberger* held that the fairness of a settlement could *substitute* for the Rule 23(a) inquiries. Indeed, in an earlier appeal in *Malchman*, the court expressly held otherwise, noting that "the court must examine ... whether the class representative 'possess[ed] the same interest and suffer[ed] the same injury' as the class members." *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir. 1983) (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974)). In *Weinberger*, the court held merely that Rule 23 permits courts to approve settlements, *despite* their having been reached prior to class certification. 698 F.2d at 72. The Third Circuit in the instant case did not disagree. App. 36a-37a & n.9. *Weinberger* certainly did not present the question whether an uncertifiable class can become certifiable simply *because* the parties have proposed a settlement.

Finally, *White v. National Football League*, 41 F.3d 402 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995), is entirely unhelpful to petitioners, because it held only that a settlement's terms may inform the court's findings with respect to adequacy of representation. Again, this proposition is not in

---

[16] Indeed, in *Greenman*, "[n]one of the parties challenge[d] the district court's holding that [the Rule 23(a)] prerequisites were satisfied." 829 F.2d at 1544 n.5. The district court in *Greenman* understood the necessity of making Rule 23(a) and (b) findings, for it did so in advance of the settlement *and again* as part of the settlement approval process. *In re Dennis Greenman Sec. Litig.*, 622 F. Supp. 1430, 1444 (S.D. Fla. 1985); *In re Dennis Greenman Sec. Litig.*, 94 F.R.D. 273, 276-78 (S.D. Fla. 1982).

conflict with the Court of Appeals' decision in this case. *See* Part I, *supra*.

Thus, the decision below is consistent with multiple Rule 23 precedents that this Court has declined to review, the most recent being *GM Trucks* (*cert. denied*, 116 S.Ct. 88 (1995)). It is the decision in *In re Asbestos Litigation*, not the decision below, that is the odd man out. Accordingly, the instant Petition does not present a suitable vehicle — much less the *best* vehicle — for this Court to resolve a conflict created only by the Fifth Circuit's decision. Because the Fifth Circuit affirmed the district court's approval of the *Asbestos Litigation* settlement, that case would present this Court with an opportunity not only to correct the Fifth Circuit's aberrant view, but also to address the entire cluster of Rule 23, justiciability, and due process issues that are inevitably raised by these "future claimant settlement class actions." All of these issues were both raised by the parties and decided by the Fifth Circuit in *Asbestos Litigation*, whereas the Third Circuit reached only the Rule 23 "settlement class" issue below.

V. THIS CASE IS IN ANY EVENT AN UNSUITABLE VEHICLE FOR ADDRESSING RULE 23 ISSUES BECAUSE OF THE JUSTICIABILITY, JURISDICTIONAL, AND DUE PROCESS DEFECTS THAT PROVIDE ALTERNATIVE GROUNDS FOR THE JUDGMENT BELOW.

Contrary to the impression given by the Petition, this case does not involve only the single, isolated issue of the application of Rule 23 to settlement class actions. There are multiple alternative grounds, which were pressed by respondents in both courts below, for affirming the judgment of the Third Circuit. As the Court of Appeals warned, using the federal courts to pioneer legislative solutions to "vexing social problems" such as mass torts raises grave questions about "the fundaments of the federal judicial polity: jurisdiction,

justiciability, [and] notice." App. 18a. Although the court below pretermitted these issues by ruling in respondents' favor on class certification and vacating the injunction, the court nonetheless voiced "serious doubts as to the existence of the requisite jurisdictional amount, justiciability, adequacy of notice, and personal jurisdiction over absent class members," App. 19a. Since any relief for the petitioners on Rule 23 could therefore prove illusory, this Court would be well advised to consider issues about settlement class actions in some other case (perhaps *In re Asbestos Litigation*) where the Rule 23 questions are not destined to be a sideshow.

Standing. In his concurring opinion, Judge Wellford concluded that the vast majority of the class members, who merely alleged occupational exposure to asbestos at some time in the past and brought claims only for the possibility of developing some asbestos disease in the future, lacked standing because they had alleged no "'injury in fact' — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" App. 60a (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). "Fear and apprehension about a possible future physical or medical consequence of exposure to asbestos is not enough to establish an injury *in fact*." App. 61a (emphasis in original).[17] This Court's recent decision in *Lewis v. Casey*, 116 S.Ct. 2174, 2179 (1996), underscored the importance of strict enforcement of the "actual injury" requirement as "a constitutional principle

---

[17] In a nationwide diversity class action such as this one, in which the substantive tort laws of all fifty states are applicable, *see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814-23 (1985), it is vital to recall that many states do not recognize a "legally protected interest" against mere exposure to a toxin without any manifestation of physical injury. Hence exposure-only plaintiffs from those states cannot allege "non-frivolous" claims of "actual injury" sufficient to support Article III standing. *See Lewis v. Casey*, 116 S.Ct. 2174, 2181 n.3 (1996).

that prevents courts of law from undertaking tasks assigned to the political branches."

Feigned Case. Respondents also argued below that this class action is a non-justiciable feigned suit because neither plaintiffs nor plaintiffs' counsel had any intention of litigating their "futures" claims, but merely sought approval of an administrative claims process that plaintiffs and defendants undertook as a joint venture. The Third Circuit noted that:

> This contention is supported by the fact that class counsel presented the suit and settlement together with counsel for the CCR defendants in one package, after having negotiated with CCR a side-settlement of over $200 million for cases in their "inventory."

App. 30a-31a. Judge Wellford quoted sworn testimony in which *all* of the exposure-only class representatives themselves "stated emphatically" that "they did not intend to pursue the claims in the class complaint" and that they "claimed no damages and no present injury." App. 62a-66a (concurring opinion). The Court of Appeals therefore expressed "serious doubts" about justiciability (App. 19a) and concluded that "we think that what the district court did here might be ordered by a legislature, but should not have been ordered by a court." App. 59a.

Notice/Due Process/Personal Jurisdiction. The Court of Appeals also noted that:

> [Respondents] marshaled a powerful three-pronged argument that, in this futures class action with virtually no delayed opt-out rights, notice to absent class members cannot meet the requirements of Rule 23 or the Constitution.

App. 31a. The court expressed "serious concerns as to the constitutional adequacy of class notice" to absent and as yet healthy class members, *id.* at 33a, who may not even know

they were once exposed to asbestos, *id.* at 55a-56a, and opined that the problems of adequately providing notice to such plaintiffs "may be insurmountable." *Id.* at 55a. The Third Circuit had the same serious doubts about the district court's

> personal jurisdiction over class members lacking minimum contacts with the forum, because such class members have not had a meaningful opportunity to opt out and thus have not consented to jurisdiction. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985).

App. 31a.

Subject Matter Jurisdiction. The Court of Appeals also voiced "serious doubts" (App. 19a) about "subject matter jurisdiction over the exposure-only plaintiffs' claims" — which alleged only apprehension about possible future injuries — "because such claims cannot exceed the $50,000 minimum required by the diversity statute." App. 31a. The exposure-only class representatives uniformly testified under oath that they were not claiming any damages or any present injury. App. 66a.

Fairness of the Settlement. Finally, the fairness of the settlement under Rule 23(e) would be subject to appellate review on any subsequent appeal from a final district court judgment, and the opinion below suggests that the settlement would be unlikely to pass muster. In holding that the class action failed to meet the fairness component of the Rule 23(b)(3) "superiority" test, the Third Circuit ruled that the inclusion of future claimants in the class settlement along with presently injured plaintiffs raised "serious fairness concerns." App. 20a. The district court's rather conclusory findings notwithstanding, the Court of Appeals determined that the settlement's allocation of benefits was fatally tainted by "serious intra-class conflicts" (App. 49a) and that the future plaintiffs had been denied terms that all "rational actors" would

insist upon. App. 49a-50a & n. 14. If those exposure-only future plaintiffs, who constitute the vast majority of the class, were so ill-treated by the settlement that it could not even pass the Rule 23(b)(3) test for whether this class action settlement was a superior means of resolving their claims, it seems clear that the settlement has no hope of passing the more searching inquiry under Rule 23(e).

This Court should not resolve questions about the application of Rule 23 to settlement classes in a case in which the class action is fatally flawed in so many other ways that the Court's opinion is extremely unlikely to make any difference in the outcome.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FREDERICK M. BARON
BRENT M. ROSENTHAL
STEVE BAUGHMAN
BARON & BUDD, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, TX 75219
(214) 521-3605

LAURENCE H. TRIBE
Counsel of Record
BRIAN STUART KOUKOUTCHOS
JONATHAN S. MASSEY
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

Counsel for Respondents George Windsor, et al.

September 30, 1996